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Supreme Court, U.S.
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No. 99-1567

IN THE

Supreme Court of the United States

PARAMOUNT PICTURES CORPORATION, a Delaware corporation, and HOST INTERNATIONAL, INC., a Delaware corporation,

Petitioners,

—v.—

GEORGE WENDT, an individual, and JOHN RATZENBERGER, an individual,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Of Counsel:

JOEL KURTZBERG
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

ROBERT S. CHAPMAN
GREENBERG, GLUSKER, FIELDS,
CLAMAN & MACHTINGER
1900 Avenue of the Stars
Suite 2000
Los Angeles, CA 90067
(310) 553-3610

WILLIAM T. RINTALA
RINTALA, SMOOT, JAENICKE
& REES
10351 Santa Monica Boulevard
Suite 400
Los Angeles, CA 90025-6937
(310) 203-0935

June 28, 2000

FLOYD ABRAMS
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner Paramount Pictures Corp.

Attorneys for Host International, Inc.

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ARGUMENT

Respondents George Wendt and John Ratzenberger argue that review should be denied because: (1) a ruling by the Court concerning copyright preemption will not dispose of the entire case; (2) questions of fact and law remain to be decided; (3) Petitioners' arguments concerning conflict preemption, the Dormant Copyright Clause and the First Amendment have been waived; and (4) the decision below is correct. Each of these arguments should be rejected and *certiorari* should be granted.

1. Wendt and Ratzenberger argue that plenary review should be denied because a finding that their right of publicity claims are preempted by federal copyright law would not dispose of the entire case. This is simply untrue. Of itself, a finding of copyright preemption will necessitate a dismissal of Respondents' entire Complaint.

Respondents' Complaint, attached hereto as App. 1a-16a, contains six causes of action: common law right of publicity, statutory right of publicity, invasion of privacy, unjust enrichment and unfair business practices under both California state law and under the Lanham Act. Because the factual predicate underlying each of the state claims is identical—namely, that the 'Hank' and 'Bob' robots were "designed to impersonate, appear as, and otherwise to invoke in the minds of the general public, the images, likenesses, identities and personas of Plaintiffs in the portrayal of their respective roles of 'Norm' and 'Cliff' "—[1] both the district court and the court of appeals below correctly treated all of these claims as identical for preemption purposes and applied a single preemption inquiry.[2] While the preemption inquiry

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[1] App. 4a (Complaint ¶ 16, which is realleged in each cause of action).

[2] *See, e.g.*, Pet. at 26a (court of appeals finding that all of "[p]laintiffs' state law causes of action are not preempted by the operation of federal copyright statutes" but citing only right of publicity case law); *id.* at 34a (district court finding all state claims preempted

in the courts below (and in our Petition) focused on Respondents' right of publicity claims because they constituted the nub of Respondents' case, all of Respondents' state claims—whatever their captions—assert a single right-of-publicity-type allegation and therefore stand or fall together on the issue of copyright preemption.[3]

Respondents' argument that their Lanham Act claim could proceed to trial even if their state law claims were preempted is equally misconceived. While a federal claim under the Lanham Act cannot be "preempted" by federal copyright law, Ninth Circuit case law—like that of other courts—[4] requires the dismissal of a Lanham Act claim that is duplicative of a copyright claim.[5] In *Shaw* v. *Lindheim*, 919 F.2d 1353 (9th Cir. 1990), for example, the Ninth Circuit refused to allow a claim for "reverse passing off" to be stated under the Lanham Act on the ground that the Federal Copyright Act already provided an adequate remedy. *Shaw*, 919 F.2d at 1364-65

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because "[e]ach of plaintiffs' claims is premised on the proposition that the 'Hank' and 'Bob' animatronic figures evoke in the minds of the general public the image of plaintiffs playing their respective fictional roles").

[3] *See* App. 4a, 8a-12a (Complaint ¶¶ 16, 35-60).

[4] *See, e.g.*, *Marvullo* v. *Gruner & Jahr*, No. 98 Civ. 5000 (RLC), 2000 WL 791849, at *6 (S.D.N.Y. June 19, 2000) (Lanham Act claim rejected because it is "impermissibly duplicative of [a] claim for relief under the Copyright Act"); *Goes Lithography Co.* v. *Banta Corp.*, 26 F. Supp. 2d 1042, 1047 (N.D. Ill. 1998) (Lanham Act claim that is "no different in its requisite elements" than a preempted state claim for unfair competition dismissed as duplicative of copyright action); *Markogianis* v. *Burger King Corp.*, No. 95 Civ. 4627 (JFK), 1997 WL 167113, at *6-7 (S.D.N.Y. Apr. 8, 1997) (Lanham Act claim dismissed as mere equivalent of copyright claim).

[5] *See generally* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.01[D], at 1-66.6 (2000) (recognizing the general rule that "the current Copyright Act does not in any manner repeal or otherwise affect other federal statutes that may in some degree overlap with the Copyright Act," but noting that the Ninth Circuit has provided for an exception to this rule in the context of the Lanham Act) (citing *Shaw* v. *Lindheim*, 919 F.2d 1353 (9th Cir. 1990)).

("We decline to expand the scope of the Lanham Act to cover cases in which the Federal Copyright Act provides an adequate remedy."). Moreover, in *Comedy III Productions, Inc.* v. *New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000), the Court held, in refusing to apply the Lanham Act to protect material that had entered into the public domain under copyright law, that "the Lanham Act cannot be used to circumvent copyright law." Respondents' Lanham Act claim—which is functionally equivalent to their state law claims—would have to be dismissed if Respondents' state law claims were found to be preempted.

2. Wendt and Ratzenberger also maintain that review should be denied because this case involves "unresolved issues of fact" that should be decided by the courts below. (Resp. Opp. Br. at 2-6.) But the nearly three pages of "unresolved" facts listed by Respondents are entirely irrelevant to the preemption inquiry presented to this Court. If Respondents' state law claims are preempted by copyright law, then it cannot matter, to take two examples from the list proffered by Respondents, how much the 'Hank' and 'Bob' robots resemble Wendt and Ratzenberger or whether or not Paramount, in an overabundance of caution, advised Host to avoid the prospect of litigation by getting Respondents' consent before putting the robots on display. In the end, this Court need not make a single factual determination in order to determine if the Ninth Circuit erred in entertaining state law claims in violation of federal law.[6]

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[6] Respondents' confusion seems to stem from their erroneous belief that the Ninth Circuit's ruling was limited to a holding that "because Respondents' state law and Lanham Act claims raised many disputed issues of fact, the district court should not have resolved that beehive of factual disputes on summary judgment." Resp. Opp. Br. at 9. This description only acknowledges part of the Ninth Circuit ruling—that which the court of appeals made only *after* ruling that preemption did not apply. The viability of the preemption ruling—contrary to that portion of the opinion focused on exclusively by Respondents—*does* rest on the Ninth Circuit's interpretation of the scope of state publicity rights and is completely independent of the factual issues Respondents now cite.

Wendt and Ratzenberger's argument that review should be denied because of "unresolved legal issues" should also be rejected. The legal issues that Respondents now claim, for the first time, that "no court has yet determined"—namely, "that (1) the characters Norm and Cliff are copyrightable; (2) Paramount owns the exclusive rights to those characters; [and] that (3) Host's robots are protectable derivative works" (Resp. Opp. Br. at 10)—have in fact *all* been ruled upon by the district court below, which held that:

- "Paramount owns the copyright to each episode of the television series known as 'Cheers' and to all copyrightable components contained therein, including the fictional characters 'Norm' and 'Cliff' and any derivative works." (Pet. at 20a.)
- "Plaintiffs have no rights, proprietary or otherwise, in the fictional characters 'Norm' and 'Cliff'. Plaintiffs have no rights, proprietary or otherwise, in their respective portrayals of the fictional characters 'Norm' and 'Cliff'." (Pet. at 21a.)
- "[Host's robots] are derivative works of the 'Cheers' television series." (Pet. at 20a.)

Wendt and Ratzenberger never raised any objections to these conclusions below. As the court of appeals noted, Wendt and Ratzenberger have, throughout this litigation, "freely concede[d] that they retain no rights to the characters Norm and Cliff." (Pet. at 8a.) They cannot now claim that these matters are "unresolved" when they were, in fact, not disputed and resolved in Petitioners' favor.

3. Wendt and Ratzenberger offer little by way of substantive arguments in response to Petitioners' demonstration that the Ninth Circuit's decision in this case is contrary to conflict preemption, Dormant Copyright Clause, and First Amendment jurisprudence. Rather, Respondents merely claim that Petitioners waived these arguments by failing to raise them below. (Resp. Opp. Br. at 26-29.) Under this

Court's precedents, however, none of Petitioners' arguments have been waived.

Arguments are not waived if they are *either* raised *or* passed upon below. In *United States* v. *Williams*, 504 U.S. 36, 41 (1992), the Court held that:

> "Our traditional rule . . . precludes a grant of *certiorari* only when 'the question presented was not pressed or passed upon below'. . . . [T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon. . . ."

Williams, 504 U.S. at 41; *see also Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991) (granting *certiorari* where issue was passed upon but not raised below); *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .' ") (citation omitted). Moreover, this rule is not inflexible, particularly in cases coming from the federal courts. *See, e.g., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

Petitioners' claims were all raised *and* ruled upon below. Wendt and Ratzenberger's argument that Petitioners somehow waived their conflict preemption and Dormant Copyright Clause arguments below—even though Petitioners squarely raised the issue of copyright preemption—ignores a long line of this Court's precedents holding that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); *see also Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 78 n.2 (1988) ("mere enlargement" of claims raised below is permitted); *Dewey* v. *City of Des Moines*, 173 U.S. 193, 197-98 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed.").

In *Yee*, for instance, the petitioners raised new arguments before this Court in support of a takings claim they made in the state courts below. In rejecting the argument that petitioners waived these arguments, the Court held that:

> "Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are, rather, separate arguments in support of a single claim—that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here."

Yee, 503 U.S. at 534-35.

Likewise, in this case, the fact that the Petitioners raised a copyright preemption claim below is sufficient to preserve all arguments in support of that claim. In any event, even if those arguments could be considered to be separate "claims," they were preserved by Judge Kozinski's analysis of them in his dissenting opinion to the denial of rehearing *en banc*—which makes clear that the court of appeals passed on these issues in denying rehearing. (Pet. at 41a-46a.)

Petitioners' First Amendment claim was also raised and ruled upon below. In Petitioners' petition for rehearing *en banc*, Paramount and Host both argued that the Ninth Circuit's opinion in this case conflicted with the California Court of Appeals' decision in *Polydoros* v. *Twentieth Century Fox Film Corp.*, 67 Cal. Rptr. 2d 305 (Ct. App. 1997), which struck down on First Amendment grounds a right of publicity claim asserted by an individual who claimed that his name and likeness had been misappropriated for commercial use in a fictional film. (Pet. at 7.) This alone is sufficient to preserve Petitioners' First Amendment claim. *See Hathorn* v. *Lovorn*, 457 U.S. 255, 262-65 (1982) (granting *certiorari* concerning claims that were raised for the first time, but not passed upon, in the Mississippi Supreme Court on a petition for rehearing). Judge Kozinski's dissenting opinion, how-

ever—which addresses the First Amendment issue at length—erases all doubt about whether Petitioners preserved their First Amendment arguments. (Pet. at 46a-48a.) Because the Ninth Circuit addressed the First Amendment issue, Petitioners may clearly raise it here. *Williams*, 504 U.S. at 41; *Stevens*, 500 U.S. at 8; *Lebron*, 513 U.S. at 379.

4. Wendt and Ratzenberger do not and cannot dispute that the Ninth Circuit's opinion in this case—as well as the Fifth Circuit's opinion in *Brown* v. *Ames*, 201 F.3d 654 (5th Cir. 2000)—applies an express preemption test that is facially at odds with that applied in the Seventh Circuit's decision in *Baltimore Orioles, Inc.* v. *Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987). While Wendt and Ratzenberger strain to argue that the facts of *Baltimore Orioles* are distinguishable (Resp. Opp. Br. at 22-23),[7] they cannot escape the fact that the Seventh Circuit's analysis of the first prong of the test for preemption under section 301 of the Copyright Act examines the *work alleged to have violated the right of publicity*, whereas the Ninth and Fifth Circuits' first-prong analysis examines the *item being protected by the right of publicity*. (Pet. at 10-11.) Nor can Respondents explain away the fact that the Seventh Circuit applied the second prong of its express preemption test to right of publicity claims differently than the Ninth and Fifth Circuits did—and that that different approach, if applied to the facts of this case, would indisputably lead to a finding of preemption. This Court should grant review to resolve this important circuit conflict.

Moreover, it is no answer to the conflict—or to the determination of how to resolve it—for Respondents to maintain

[7] Respondents' attempt to distinguish *Baltimore Orioles* on the ground that it applies only to right of publicity claims made "in a performance that has been reduced to tangible form" is unconvincing. Respondents fail to provide any principled reasons as to why that factual distinction has any legal significance. What is important—and what cannot seriously be disputed—is that the Seventh Circuit's express preemption test, if applied to the facts of this case, would lead to a contrary result than that reached by the Ninth Circuit.

that they are merely seeking to protect their right to sell "their own personas and identities as human beings" (Opp. Br. 12-13), which are not subject to copyright protection. This is simply another way of restating the key question in the case, not of answering it. Since the reality, as Judge Kozinski pointed out, is that "to millions of viewers, Wendt and Ratzenberger are Norm and Cliff" and that it is "impossible to exploit the former without also exploiting the latter" (Pet. at 42a), the core question remains whether Respondents *may* control their "personas" in a manner that prevents Petitioners from exercising "the right to exploit the Cheers characters" under the Copyright Act.

Respondents further argue that the express preemption test applied by the Ninth and Fifth Circuits is the correct one because the test applied by the Seventh Circuit is "circular and unworkable." (Resp. Opp. Br. at 14n.) But as illustrated by the California Court of Appeals decision in *Fleet* v. *CBS, Inc.*, 58 Cal. Rptr. 2d 645 (Ct. App. 1996), it is the test of the Ninth and Fifth Circuits that more aptly fits this description.

Respondents miss our point in discussing *Fleet* entirely. It is less significant that the Ninth Circuit's decision in this case directly conflicts with the decision in *Fleet* than it is that the obvious result in *Fleet*—that a right of publicity claim directed at preventing the display of a copyrighted work itself is preempted—cannot be reached using the Ninth Circuit's express preemption analysis. This is because, in the end, the Ninth Circuit's analysis inevitably leads to the conclusion that right of publicity claims—which, by definition, protect items that are not copyrightable—are not preempted by copyright. In contrast, under the Seventh Circuit's analysis, some but not all, right of publicity claims will be preempted.

Respondents' argument that the test articulated by the Ninth Circuit is the correct one because it is supported by a long line of Ninth Circuit precedents (Resp. Opp. Br. at 15-18) also misses the point. It is precisely this long line of wrongly-decided Ninth Circuit cases that has set that court on

the collision course described in our opening brief with copyright and First Amendment jurisprudence in the first place.

Respondents also fail to respond substantively to Petitioners' conflict preemption arguments. As this Court has recently reaffirmed, conflict preemption is appropriate "where it is impossible for a private party to comply with both state and federal law, and where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Crosby* v. *National Foreign Trade Council*, No. 99-474, 2000 WL 775550, at *6 (U.S. June 19, 2000). The Ninth Circuit's overbroad interpretation of the California right of publicity—as applied to this case—has been widely criticized as conflicting directly with Petitioners' exclusive rights under federal copyright law to create and depict derivative works. *See, e.g.*, 1 Nimmer § 1.01[B][3][c] note 286.20 at 1-66.1. It is this direct conflict that makes this case so unique: the Ninth Circuit has applied the right of publicity so broadly as to prevent copyright owners from doing nothing more than exercising their exclusive right to display a derivative work.

Respondents' reliance on *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) is entirely misplaced. (Resp. Opp. Br. at 27-28.) This is because, notwithstanding Respondents' claim to the contrary, the legislative history of section 301 does *not* expressly conclude that copyright never preempts the right of publicity, but only that copyright will preempt *some* right of publicity claims. *See* H.R. Rep. No. 94-1476, at 132, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748. Because Congress never determined—as Respondents claim—that right of publicity claims categorically "do not conflict with the purposes or objectives of the Copyright Act," this Court's decision in *Bonito Boats* does not apply. (Resp. Br. Opp. at 28.)

Finally, Respondents also fail to provide *any* substantive response to Petitioners' Dormant Copyright Clause and First Amendment arguments. Far from being "academic" or "spec-

ulative" (Resp. Opp. Br. at 28-30), Petitioners' First Amendment and Dormant Copyright Clause concerns are concrete and immediate, as set forth in both our petition and in Judge Kozinski's dissenting opinion. (Pet. at 19-29, 46a-48a.)

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Dated: New York, New York
June 29, 2000

Respectfully submitted,

Of Counsel:

JOEL KURTZBERG
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

ROBERT S. CHAPMAN
GREENBERG, GLUSKER, FIELDS,
CLAMAN & MACHTINGER
1900 Avenue of the Stars
Suite 2000
Los Angeles, CA 90067
(310) 553-3610

WILLIAM T. RINTALA
RINTALA, SMOOT, JAENICKE
& REES
10351 Santa Monica Boulevard
Suite 400
Los Angeles, CA 90025-6937
(310) 203-0935

FLOYD ABRAMS
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
Paramount Pictures Corp.

Attorneys for Host
International, Inc.

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Wendt v. Host International, Inc., Complaint (U.S. Dist. Ct. C.D. Cal. Jan. 5, 1993) 1a

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 93 0142 R
Filed Jan 12, 1993

GEORGE WENDT, an individual, and
JOHN D. RATZENBERGER, an individual

Plaintiffs,

vs.

HOST INTERNATIONAL, Inc., a Delaware corporation,

Defendant.

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF FOR:

1) Unfair Competition [15 U.S.C. § 1125(A)]
2) Infringement of Right of Publicity
3) Invasion of Privacy by Appropriation of Name and Likeness [Cal. Civ. code § 3344]
4) Invasion of Privacy
5) Unfair Business Practices [bus. & Prof. Code § 17200 *et seq.*]
6) Unjust Enrichment

TRIAL BY JURY DEMANDED
(F.R.Civ.P. Rule 38)

Plaintiffs George Wendt and John D. Ratzenberger (hereinafter jointly referred to, where the context permits, as "Plaintiffs") complain and allege as follows:

JURISDICTION AND VENUE

1. That, this action arises under the Lanham Act, 15 U.S.C. Sections 1051, *et seq.*, and pendant claims. Further, that this case represents an action between citizens of different states and the amount in controversy exclusive of interest and costs exceeds the sum of $50,000.00. Jurisdiction is conferred upon this Court by 15 U.S.C. Sections 1051 *et seq.* and 28 U.S.C. Sections 1331, 1332 and 1338.

2. That, venue lies in the Central District of California pursuant to 28 U.S.C. 1391(b) on the grounds that a substantial part of the events or omissions giving rise to the claim on which this action is based occurred herein, and, alternatively, pursuant to 28 U.S.C. 1391(c) on the grounds that Defendant is a corporation doing business in this judicial district.

PARTIES

3. That, Plaintiff George Wendt ("Wendt"), an individual, is a resident of the State of California.

4. That, Plaintiff John D. Ratzenberger ("Ratzenberger"), an individual, is a resident of the State of California.

5. That, Plaintiffs are informed and believe, and thereby allege, that Defendant Host International, Inc. (referred to

herein as "Defendant Host") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business situated in the District of Columbia. Further, that Defendant Host is qualified to do business in the State of California.

COMMON ALLEGATIONS

6. That, Plaintiff Wendt is, and at all times relevant was, a professional actor/comedian who has invested substantial time, energy and finances in the perfection of his artistry, and as a result thereof has achieved considerable professional success and notoriety by virtue of his numerous performances on stage, screen and television.

7. That, in or about 1982 Plaintiff Wendt was engaged as a principal cast member to perform the role of "Norm" in a television series to become known as "Cheers."

8. That, Plaintiff Ratzenberger, likewise, is, and at all times relevant was, a professional actor/comedian who has invested substantial time, energy and finances in the perfection of his artistry, and as a result thereof has achieved considerable professional success and notoriety by virtue of his numerous performances on stage, screen and television.

9. That, in or about 1982 Plaintiff Ratzenberger was engaged as a principal cast member to perform the role of "Cliff" in a television series to become known as "Cheers."

10. That, from the inception of "Cheers" to the present, Plaintiffs have exclusively performed the respective roles of "Norm" and "Cliff" therein.

11. That, from 1982 to the present the television series "Cheers" has been broadcast continuously, enjoying both popular and critical success, winning 26 Emmy Awards, and attaining the status of the top-rated television program for the 1990-91 season.

12. That, by virtue of Plaintiffs' unique artistry in their rendition of their respective characters on "Cheers" in addition to, and augmented by their other professional performances throughout their careers, Plaintiffs' names, likenesses, identities and *personas* have become widely-known to a substantial segment of the domestic and international public, and, thereby, their names, likenesses, identities and *personas* have become valuable assets, symbolizing the Plaintiffs, their quality of performance, and their goodwill.

13. That, Plaintiffs' respective interests in their goodwill represent valuable commercial assets which they alone have the right to license and exploit.

14. That, Defendant Host is in the business of, *inter alia*, operating food and beverage facilities in airports throughout the United States, and the world.

15. That, in or about 1991, Defendant Host, under a limited license from Paramount Pictures, the producer of "Cheers," introduced, in several airports throughout the United States, bars designed as facsimiles of the "Cheers" bar, and otherwise thematically conceived to approximate the subjective environment of the fictional milieu of the aforementioned television series.

16. That, in connection with Defendant Host's exploitation of the "Cheers" bar concept, it introduced in such venues, lifesize, animatronic replications designed to impersonate, appear as, and otherwise to invoke in the minds of the general public, the images, likenesses, identities and *personas* of Plaintiffs in the portrayal of their respective roles of "Norm" and "Cliff."

17. That, Defendant Host, in connection with the installation of these robotic figures, sought and continues to seek to exploit through three dimensional, mechanical animation, the totality of Plaintiffs' personal characteristics, for

the avowed purpose of associating in the minds of its patrons and consumers references to the Plaintiffs.

18. That, said animatronic exploitations of the images, likenesses, identities and *personas* of Plaintiffs, have been without any grant of rights or license by Plaintiffs to Defendant Host, and represent an intentional misappropriation, and infringement of Plaintiffs' individual rights.

19. That, by letter dated December 10, 1992, counsel for Plaintiffs demanded that Defendant Host immediately cease and desist from any further misappropriation or exploitation of Plaintiffs' identities, a copy of which letter is attached hereto, made a part hereof, and marked Exhibit "A."

20. That, notwithstanding said demand, Defendant Host has failed and refused to comply with Plaintiffs' request and otherwise continues its unlawful course of conduct designed to deliberately infringe upon Plaintiffs' rights.

21. That, Defendant Host's manifest intention to continue its unlawful exploitations has left Plaintiffs no alternative but to seek protection of their rights and reputation in this action.

FIRST CLAIM FOR RELIEF
(Unfair Competition [15 U.S.C. §1125 (a)])

22. That, Plaintiffs hereby repeat and reallege Paragraphs 1 through 21 of their Complaint as though the same were set forth here in their entirety.

23. That, Plaintiffs are informed and believe, and thereon allege, that Defendant Host, on behalf of itself and/or others, has embarked upon a course of conduct to unlawfully utilize Plaintiffs' *personas* by incorporating Plaintiffs' identities in the above-described animatronic replications placed in its "Cheers" operations in interstate commerce, and has advertised and sold, and is currently

advertising and selling, in interstate commerce, products, merchandise, goods and services from Defendant Host's "Cheers" operations.

24. That, Defendant Host's misappropriation of Plaintiffs' *personas* is likely to cause confusion, mistake or deception among consumers as to the source and endorsement of Defendant Host's goods and services by implying that Defendant Host's goods and services originate from, are affiliated with, or are approved by Plaintiffs, and, thus, constitutes unfair competition and a false designation of origin, and is violative of Plaintiffs' rights. Plaintiffs are informed and believe, and thereon allege, that Defendant Host used and continues to use Plaintiffs' identities with the intent to cause such confusion, mistake and deception, and with the hopes of profiting therefrom.

25. That, by reason of Defendant Host's wrongful acts of unfair competition as alleged herein, Plaintiffs have been damaged in an amount to be determined at trial.

26. That, Plaintiffs are informed and believe, and thereon allege, that unless restrained by this Court, Defendant Host will continue to unfairly compete with Plaintiffs, thus causing confusion and deception in the marketplace, and engendering a multiplicity of judicial proceedings. Unless restrained by this Court, irreparable harm is likely to occur to Plaintiffs, and pecuniary compensation will not afford Plaintiffs adequate relief for the damage to their goodwill.

SECOND CLAIM FOR RELIEF
(Right of Publicity)

27. That, Plaintiffs hereby repeat and reallege Paragraphs 1 through 21, and 23 through 26 of their Complaint as though the same were set forth here in their entirety.

28. That, in or about 1991 and continuing to date, Defendant Host, knowingly invaded Plaintiffs' rights of publicity by incorporating Plaintiffs' identities into animatronic replications in its "Cheers" operations.

29. That, Defendant Host's invaded Plaintiffs' rights intentionally and with full and complete knowledge that its use of Plaintiffs identities was unauthorized and without the prior license or consent of Plaintiffs.

30. That, Defendant Host invaded Plaintiffs' rights to attract attention and evoke a desired response from Defendant Host's consumers for the purpose of advertising and soliciting purchases of Defendant Host's products, merchandise, goods and services, thereby converting potential economic value in Plaintiffs' identities to Defendant Host's commercial advantage.

31. That, Defendant Host's conversion of Plaintiffs' rights of publicity usurps Plaintiffs' ability to control their public image and dilutes their ability to effectively market such image, all to the detriment of Plaintiffs' reputation and goodwill.

32. That, Plaintiffs are informed and believe, and thereon allege that, as a proximate result of advantage accruing to Defendant Host from its infringement of Plaintiff's' *personas*, and as a proximate result of Defendant Host's wrongful use of Plaintiffs' international identities in connection with Defendant Host's publicity, advertising and sale of its goods and services, as hereinabove alleged, the Plaintiffs have been and/or will be deprived of monetary sums in an amount to be determined at trial.

33. That, Defendant Host's intentional actions, as described hereinabove, amount to malice as Defendant Host's acts were carried on with a willful and conscious disregard of Plaintiffs' rights. Plaintiffs therefore seek an award of punitive damages.

34. Plaintiffs are informed and believe, and thereon allege, that unless restrained by this Court, Defendant Host will continue to infringe Plaintiffs' rights of publicity engendering a multiplicity of judicial proceedings. Unless restrained by this Court, irreparable harm is likely to occur to Plaintiffs, and pecuniary compensation will not afford Plaintiffs adequate relief for the damages to their goodwill.

THIRD CLAIM FOR RELIEF
(Invasion of Privacy by Commercial Appropriation [Cal.Civ.Code § 3344])

35. That, Plaintiffs hereby repeat and reallege Paragraphs 1 through 21, 23 through 26, and 28 through 34 of their Complaint as though the same were set forth here in their entirety.

36. That, in or about 1991 and continuing to date, Defendant Host, knowingly and without Plaintiffs' prior consent, invaded Plaintiffs' right to privacy by appropriating Plaintiffs' *personas* by incorporating Plaintiffs' identities into animatronic replications in its "Cheers" operations thereby implying Plaintiffs assistance and endorsement of Defendant Host's operations.

37. That, Defendant Host's embarked on such course of conduct knowing that such appropriation was unauthorized, unlicensed and without the prior consent of Plaintiffs.

38. That, Defendant Host's conduct involved the appropriation of Plaintiffs' *personas* in that Plaintiffs are identifiable celebrities and a significant segment of the general population can reasonably determine that Plaintiffs are impersonated by Defendant Host's robotic replications.

39. That, the appropriation of Plaintiffs' identities by Defendant Host was, and continues to be, for the purpose

of advertising and soliciting purchases of products, merchandise, goods and services from Defendant Host's "Cheers" operations.

40. That, Defendant Host's use of Plaintiffs' identities has resulted in a commercial advantage to Defendant Host and is violative of Plaintiffs' rights.

41. That, by reason of Defendant Host's wrongful acts of appropriation of Plaintiffs' *personas* as alleged herein, Plaintiffs have been damaged in an amount to be determined at trial.

42. That, Defendant Host's intentional actions, as described hereinabove, were conducted with malice in that Defendant Host's acts were carried on with a willful and conscious disregard of Plaintiffs' rights. Plaintiffs therefore seek an award of punitive damages.

43. That, Plaintiffs are informed and believe, and thereon allege, that unless restrained by this Court, Defendant Host will continue to appropriate Plaintiffs' *personas* to Defendant Host's advantage, thus causing confusion and deception in the marketplace, and engendering a multiplicity of judicial proceedings. Unless restrained by this Court, irreparable harm is likely to occur to Plaintiffs, and pecuniary compensation will not afford Plaintiffs adequate relief for the damage to their goodwill.

FOURTH CLAIM FOR RELIEF
(Common Law Invasion of Privacy)

44. That, Plaintiffs hereby repeat and reallege Paragraphs 1 through 21, 23 through 26, 28 through 34, and 36 through 43 of their Complaint as though the same were set forth here in their entirety.

45. That, in or about 1991 and continuing to the present, Defendant Host, without Plaintiffs' consent, invaded Plain-

tiffs' common law right to privacy by appropriating Plaintiffs' *personas* by incorporating Plaintiffs' identities into animatronic replications in its "Cheers" operations thereby implying Plaintiffs assistance, sponsorship and/or endorsement of Defendant Host's operations.

46. That, Defendant Host's appropriation was knowingly unauthorized, unlicensed and without Plaintiffs consent.

47. That, Defendant Host's conduct involved the appropriation of Plaintiffs' *personas* in that the use of Plaintiffs identities in association with Defendant Host's animatronic replications implied Plaintiffs assistance with their preparation and/or construction, and constituted the exploitation of Plaintiffs' celebrity status.

48. That, said misappropriation was for Defendant Host's advantage in that it was for Defendant Host's pecuniary gain and profit.

49. That, Defendant Host's use of Plaintiffs' *personas* has resulted in a commercial advantage to Defendant Host and is violative of Plaintiffs' rights.

50. That, by reason of Defendant Host's wrongful acts of misappropriation of Plaintiffs' *personas* as alleged herein, Plaintiffs have been damaged in an amount to be determined at trial.

51. That, Defendant Host's intentional actions, as described hereinabove, were conducted with malice as Defendant Host's acts were carried on with willful and conscious disregard of Plaintiffs' rights. Plaintiffs therefore seek an award of punitive damages.

52. That, Plaintiffs are informed and believe, and thereon allege, that unless restrained by this Court, Defendant Host will continue to appropriate Plaintiffs' *personas* to Defendant Host's advantage, thus causing confusion and deception in the marketplace, and engendering a multiplicity of

judicial proceedings. Unless restrained by this Court, irreparable harm is likely to occur to Plaintiffs, and pecuniary compensation will not afford Plaintiffs adequate relief for the damage to their goodwill.

FIFTH CLAIM FOR RELIEF
(Unfair Business Practices;
Business & Professions Code §§ 17200 *et seq.*)

53. That, Plaintiffs hereby repeat and reallege Paragraphs 1 through 21, 23 through 26, 28 through 34, 36 through 43, and 45 through 52 of their Complaint as though the same were set forth here in their entirety.

54. That, Defendant Host's use of Plaintiffs' *personas* by incorporating Plaintiffs' identities into animatronic replications in its "Cheers" operations creates a likelihood that Plaintiffs' customers, potential customers, and the public generally will be confused or misled as to the source of Defendant Host's goods or services in that they are likely to believe that Plaintiffs' business is affiliated with that of Defendant Host, all to the irreparable injury of Plaintiffs' business and goodwill, and to the unjust enrichment of Defendant Host.

55. That, Defendant Host's continuing course of conduct in incorporating Plaintiffs' identities into animatronic replications in its "Cheers' operations constitutes unfair and improper business practices, which will likely cause irreparable injury to Plaintiffs.

56. That, Defendant Host's intentional actions, as described hereinabove, were conducted with malice in that Defendant Host carried on such conduct with a willful and conscious disregard of Plaintiffs' rights. Plaintiffs therefore seek an award of punitive damages.

57. That, Plaintiffs have no adequate remedy of law in that it will be extremely difficult to ascertain the true extent of damages to Plaintiffs' business and goodwill as a result of Defendant Host's wrongful actions as alleged herein. Accordingly, Plaintiffs are entitled to a preliminary and permanent injunction restraining Defendant Host from any further unlawful conduct.

SIXTH CLAIM FOR RELIEF
(Unjust Enrichment)

58. That, Plaintiffs hereby repeat and reallege Paragraphs 1 through 21, 23 through 26, 28 through 34, 36 through 43, and 54 through 57 of their Complaint as though the same were set forth here in their entirety.

59. That, by virtue of Defendant Host's unlawful misappropriation of Plaintiffs' images, likenesses, identities and *personas*, Defendant Host has been unjustly enriched to the detriment of Plaintiffs.

60. That, Defendant Host's intentional actions, as described hereinabove, were conducted with malice in that Defendant Host carried on such conduct with a willful and conscious disregard of Plaintiffs' rights. Plaintiffs therefore seek an award of punitive damages.

WHEREFORE, Plaintiffs George Wendt and John D. Ratzenberger pray for relief as follows:

1. On the First Claim for Relief:

a. For a preliminary and permanent injunction enjoining Defendant Host from exploiting Plaintiffs' images, likenesses, identities or *personas* by incorporation in animatronic replications or otherwise; and,

b. For an accounting of all revenues derived from Defendant Host's "Cheers" operations; and,

c. For Plaintiffs' damages to be determined at trial; and,

d. For the Court to determine that this is an exceptional case and award Plaintiffs' attorneys fees.

2. On the Second Claim for Relief:

a. For a preliminary and permanent injunction enjoining Defendant Host from exploiting Plaintiffs' images, likenesses, identities or *personas* by incorporation in animatronic replications or otherwise; and,

b. For an accounting of all revenues derived from Defendant Host's "Cheers" operations; and,

c. For Plaintiffs' damages to be determined at trial; and,

d. For an award of punitive damages.

3. On the Third Claim for Relief:

a. For a preliminary and permanent injunction enjoining Defendant Host from exploiting Plaintiffs' images, likenesses, identities or *personas* by incorporation in animatronic replications or otherwise; and,

b. For an accounting of all revenues derived from Defendant Host's "Cheers" operations; and,

c. For Plaintiffs' damages to be determined at trial; and,

d. For an award of punitive damages.

4. On the Fourth Claim for Relief

a. For a preliminary and permanent injunction enjoining Defendant Host from exploiting Plaintiffs' images, likenesses, identities or *personas* by incorporation in animatronic replications or otherwise; and,

b. For an accounting of all revenues derived from Defendant Host's "Cheers" operations; and,

c. For Plaintiffs' damages to be determined at trial; and,

d. For an award of punitive damages.

5. On the Fifth Claim for Relief

a. For a preliminary and permanent injunction enjoining Defendant Host from exploiting Plaintiffs' images, likenesses, identities or *personas* by incorporation in animatronic replications or otherwise; and,

b. For an accounting of all revenues derived from Defendant Host's "Cheers" operations; and,

c. For Plaintiffs' damages to be determined at trial; and,

d. For an award of punitive damages.

6. On the Sixth Claim for Relief

a. For a preliminary and permanent injunction enjoining Defendant Host from exploiting Plaintiffs' images, likenesses, identities or *personas* by incorporation in animatronic replications or otherwise; and,

b. For an accounting of all revenues derived from Defendant Host's "Cheers" operations; and,

c. For Plaintiffs' damages to be determined at trial; and,

d. For an award of punitive damages.

7. On All Claims for Relief:

a. For costs of suit incurred herein; and

b. For such other and further relief as the Court may deem just and proper, and which may otherwise be provided for by statute.

Dated: January 5, 1993

FREYDL & ASSOCIATES
T. Patrick Freydl
Thomas G. Moglovkin

By: T. PATRICK FREYDL
T. PATRICK FREYDL
Attorneys for Plaintiffs George Wendt and John D. Ratzenberg

VERIFICATION

I, George Wendt, am a plaintiff in the above-entitled action, I have read the foregoing complaint and know the contents thereof. The allegations therein are true to the best of my knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe the same to be true.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated:

GEORGE WENDT

I, John D. Ratzenberger, am a plaintiff in the above-entitled action, I have read the foregoing complaint and know the contents thereof. The allegations therein are true to the best of my knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe the same to be true.

I declare under the penalty of perjury under the laws of the State of California that the foregoing in true and correct.

Dated: JOHN D. RATZENBERGER

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury, pursuant to Rule 38 of the Federal Rules of Civil Procedure, of all issues raised by their Complaint herein.

Dated: January 5, 1993 FREYDL & ASSOCIATES
T. Patrick Freydl
Thomas G. Moglovkin

By: T. PATRICK FREYDL
T. PATRICK FREYDL
Attorneys for Plaintiffs George Wendt and John D. Ratzenberg